

<b>JEFFREY WALTER</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>J M STAFFING, LLC</b>	)	
Respondent	)	Docket No. 1,056,504
	)	
AND	)	
	)	
<b>COMMERCE AND INDUSTRY INS. CO.</b>	)	
Insurance Carrier	)	

<sup>1</sup> Respondent argues that the claimant was an independent contractor.

Respondent argues that the claimant was an independent contractor and should not be awarded compensation.

Claimant argues that the ALJ's Order should be affirmed.

### FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Jason Buessing, owner/operator of J M Staffing, LLC<sup>2</sup>, testified that the business is somewhat like Labor Pro, in that respondent hires people on a day-to-day basis to go out and work for respondent's contacts. The workers are paid for the work that they do out of the proceeds collected when the job is performed.<sup>3</sup> Respondent provides workers compensation insurance and pays payroll taxes, assigns jobs and hires and fires the workers. Mr. Buessing testified that about 5 of the people that work for the company are regular employees and the rest, about 100-150 people work by the week and are paid on a weekly basis.<sup>4</sup> These individuals are still considered to be temporary employees.

Mr. Buessing testified that claimant has periodically worked for the company and was hired by the company on a contract basis.<sup>5</sup> Mr. Buessing had no idea that the claimant lived at the Rescue Mission. He testified that it was the first part of June when he talked to claimant about a project he needed to get done. He was looking for someone who had their own tools to complete it. He testified that the claimant offered to do the job because claimant knew someone with tools. That person's name is Jerry Currlee.<sup>6</sup> Mr. Currlee was working for A-1 Painting and had his own truck and tools. Mr. Buessing met with the claimant and Mr. Currlee and explained what he needed done and to let him know how much he owed them for their work.<sup>7</sup>

Mr. Buessing testified that the claimant and Mr. Currlee did not complete the job and instead claimant hired Craig Carpenter to help him. Mr. Buessing testified that he has no

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<sup>2</sup> J M Staffing, LLC is owned by Jason Buessing and Monty Ryan. And they consider the company to be a subcontractor that supplies labor. The usual rate charged is \$15 an hour with the supplied labor being paid \$10 an hour.

<sup>3</sup> P.H. Trans. at 6.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

knowledge of what happened on June 18, 2011 besides what the claimant told him.<sup>8</sup> Mr. Buessing testified that he was the one to pay Mr. Carpenter after the claimant got hurt because Mr. Carpenter finished the job<sup>9</sup> and supplied all of the materials (tools and paintbrushes) except the paint, which Mr. Buessing supplied. There was no agreement about reimbursement for any materials that had to be bought.<sup>10</sup>

Claimant had worked for respondent for about a month and a half and was paid \$10 an hour for the painting work he performed. There was no written agreement between the claimant and respondent.<sup>11</sup> Mr. Buessing did not discuss payment for the current job at the time it was offered. The intention was to hire the claimant to paint a concrete awning for a flat fee, with direction on how to complete the job and no tools provided. Claimant told Mr. Buessing that he would let him know how much at the end of the project. Mr. Buessing's gave no directions as to how the job was to be performed except to say that he wanted it done that weekend.<sup>12</sup>

Mr. Buessing testified that when a job comes up and is presented to an employee, the project is described and the pay is determined for the job and any equipment needed for the job is discussed.<sup>13</sup> He testified that for painting jobs the contractor usually supplies all of the materials for the job except the paint.

Mr. Buessing testified that for this job he hired claimant for what was supposed to be a one time, one day deal that had nothing to do with the staffing business. Claimant had the right to hire someone to help him with the work and to distribute the money however he wanted.<sup>14</sup>

Mr. Buessing testified that the claimant had a ladder at the work site, but he isn't sure if it belonged to the claimant or respondent.<sup>15</sup>

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<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 22.

<sup>13</sup> *Id.* at 18-19.

<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 15.

A. It could have been my ladder. I'm not a hundred percent sure. I know he had a ladder and I had a ladder. If he borrowed our ladder, then he did it without my knowledge.

Q. How would he borrow your ladder without your knowledge?

A. My staff opens up my office from 6:00 to 9:00. That's when I told him, he could go ahead and get the paint. If he asked them for a ladder, they probably gave it to him.<sup>16</sup>

The job did not get done during the time that Mr. Buessing wanted because Jerry, the person claimant got to help him did not show up and he was supposed to bring the materials. Claimant still agreed to do the job and two weeks later found Craig Carpenter to help him.

Mr. Buessing testified that he found out about claimant falling off of a ladder from his friend Matt Mohler, who had hired claimant to help him with a painting job. Mr. Buessing had called Mr. Mohler to see how the claimant was doing or if he had shown up to work and he was told that the claimant had fallen off a ladder while painting. At the time he didn't realize that the claimant was at J M Staffing when he fell.<sup>17</sup> Mr. Buessing was later contacted by the claimant<sup>18</sup> and was informed that claimant had fallen off a ladder while painting the awning at J M Staffing and was taken to the hospital via ambulance for a possible broken hip.

Before the August 2, 2011 preliminary hearing, the claimant had been living at the Rescue Mission for 3-4 months. Currently claimant is homeless as his allotted time at the Mission ran out.

Craig Carpenter is also homeless and currently lives at the Rescue Mission. Mr. Carpenter was recruited by the claimant to help with the painting job<sup>19</sup> and it was claimant's impression that respondent would be paying the both of them at the same rate of \$10 an hour.

Claimant testified that he showed up every day to get his wages. While there claimant would pick up his work ticket for the next day if there was one.

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<sup>16</sup> *Id.* at 15-16.

<sup>17</sup> *Id.* at 25.

<sup>18</sup> *Id.* at 37-38.

<sup>19</sup> This recruitment occurred after claimant's first choice, Jerry Currlee, had to back out.

Claimant testified that he was not considered a contractor on the awning project. Claimant told Mr. Buessing that he would do the job, but was going to need some supplies for which he was told he would be reimbursed for his purchases.<sup>20</sup> Claimant testified that normally when he is offered work the companies he is working for provide the materials required for the job. If he had to purchase any additional supplies he was reimbursed.

Claimant testified that he showed up to work at 7:00 a.m. on June 18, 2011 and was let in to obtain the paint that was being supplied. He also asked to use a ladder that Mr. Buessing had mentioned. Claimant testified that he set up and had been up and down the ladder several times scraping paint when during one of his trips the ladder collapsed and he fell.<sup>21</sup> He laid on the ground for a while and when he couldn't get up 911 was called and he was transported via ambulance to the hospital. As a result of the fall, claimant had a broken pelvis in two spots and a broken left elbow.<sup>22</sup> Claimant testified that his back pain started while he was in the hospital and got worse when he was discharged and went back to Mission. There was no mention of back pain in his discharge papers, but claimant contends that the nurses knew about the back pain.<sup>23</sup>

At the hospital, claimant was treated by Dr. Polly (an orthopedic specialist) and received pain medication and had x-rays taken. Claimant was also referred to Kansas Rehab Hospital, but didn't go because he had no money or insurance to pay. Because the claimant was not able to go to the Rehab hospital, the Rescue Mission allowed him to stay an additional 2 weeks.

Claimant used a platform walker to help him ambulate for a while, which had him using his arm as a brace opposed to his hand.<sup>24</sup> Claimant has not worked since the accident.

Claimant denies drinking on the day of the accident and stated that he follows the policies of the Mission and doesn't drink when he stays there. Claimant admits to being an alcoholic and states that when he has his own place to live he consumes 3 alcoholic drinks a day.<sup>25</sup>

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<sup>20</sup> Claimant got his supplies from Dollar General and spent \$13-\$15.

<sup>21</sup> P.H. Trans. at 49.

<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.* at 61.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.* at 60.

Jerry Currlee, a painter and carpenter, testified that he was contacted by the claimant about helping paint an awning for J M Staffing. Mr. Currlee testified that claimant told him they would be paid cash for the job and would split the money and use his (Mr. Currlee's) tools.<sup>26</sup> Mr. Currlee testified when he and the claimant showed up at respondent's they were told that there were no tools available for them to complete the job. Mr. Currlee told Mr. Buessing that he and the claimant would contract the job and split the money and use his tools.<sup>27</sup> It was Mr. Currlee's understanding that Mr. Buessing was going to supply the paint, paintbrushes, rollers and roller pans.<sup>28</sup> The claimant and Mr. Currlee agreed upon a price of \$300. There was never an understanding that the claimant would be considered the boss because Mr. Currlee has 30 years of experience painting and the claimant does not. This was not discussed with Mr. Buessing.

Mr. Currlee testified that his preference for the job was to pressure wash it first and then scrape before painting so that the paint would hold better. He didn't think that a ladder would be needed because he had extension poles and would be able to stand on the ground and complete the job. Mr. Buessing gave no direction on how the job should be done.<sup>29</sup>

However, Mr. Currlee never started the job because when he showed up to work the claimant, in his opinion, was drunk and he didn't want to work with him. Mr. Currlee testified that he knew claimant was drunk because claimant had a beer in his cooler and he was already drunk when he got there. Mr. Currlee testified that this is a problem because he is a recovering alcoholic and it would have been a problem for him to be around the claimant if he were drinking on the job. Claimant testified the Mr. Currlee didn't show up because his son had died, Mr. Currlee denies this.<sup>30</sup> Mr. Currlee had no further contact with respondent after he left that day and continued with his job duties at A-1 Painting. According to Mr. Currlee, claimant used to work for A-1 Plumbing before he was let go for drinking on the job.

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<sup>26</sup> *Id.* at 66. He has all of the necessary equipment to complete a painting job.

<sup>27</sup> *Id.* at 66.

<sup>28</sup> *Id.* at 70-71.

<sup>29</sup> *Id.* at 68.

<sup>30</sup> *Id.* at 69.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>31</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>32</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>33</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>34</sup>

Respondent argues that claimant was an independent contractor in this matter rather than an employee. Respondent contends that claimant was being paid for the job, was to provide the tools and materials, with little or no control on respondent's part. Claimant contends that he was being paid by the hour with respondent furnishing the paint and the tools to do the job. The ladder that claimant was using when he fell belonged to respondent. It was the breaking ladder that caused claimant to suffer the injury in question.

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

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<sup>31</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>32</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>33</sup> K.S.A. 44-501(a).

<sup>34</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

1. The existence of a contract to perform a certain piece of work at a fixed price;
2. The independent nature of the worker's business or distinct calling;
3. The employment of assistants and the right to supervise their activities;
4. The worker's obligation to furnish tools, supplies and materials;
5. The worker's right to control the progress of the work;
6. The length of time that the worker is employed;
7. Whether the worker is paid by time or by the job; and
8. Whether the work is part of the regular business of the employer.<sup>35</sup>

Respondent is a temporary job agency, hiring people to perform short term jobs for different employers. The job offered to claimant was exactly that. A short term job. Claimant had worked for respondent for several months, performing various jobs for other employers. Claimant owned no tools or equipment. While certain elements of the agreement lend one to think independent contractor, the majority of the facts point to respondent having sufficient control over claimant's labors to constitute an employment relationship.

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.<sup>36</sup>

The Kansas Legislature has clearly expressed an intent to liberally construe the Act for the purpose of bringing both the employer and the employee within the provisions of the Act. The intent is to provide the protections of the Workers Compensation Act to both. Here, the legislative intent appears to be best served with a finding that claimant was an employee of respondent on the date of accident. Therefore, the Order of the ALJ finding that claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent, should be affirmed.

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<sup>35</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>36</sup> K.S.A. 44-501(g).



By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>37</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

#### **CONCLUSIONS OF LAW**

Claimant has proven by a preponderance of the credible evidence that he was an employee of respondent on the date of the accident. Claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The Order granting temporary benefits by the ALJ is affirmed.

#### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated August 2, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2011.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge

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<sup>37</sup> K.S.A. 44-534a.